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SUPREME COURT, U. S.

No. 74-632

In the
Supreme Court of the United States
OCTOBER TERM, 1974

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MICHAEL RODAK, JR., CLERK

SILVIO J. IRALI,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Silvio J. Irali, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Opinion Below

The opinion of the Court of Appeals, not yet reported, is reprinted herein as Appendix A, *infra*.

Jurisdiction

The judgment of the Court of Appeals was entered on September 12, 1974. Petitioner's petition for rehearing was denied on October 23, 1974. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. May petitioner be convicted for having violated the Hobbs Act, 18 U.S.C. 1951, for alleged extortion of money from a tavern owner, where all beverages sold in the Illinois tavern were purchased from Illinois distributors and thus had come to rest and were no longer in interstate commerce when purchased by the tavern owner?

2. Does not application of the Hobbs Act to the above-stated situation constitute Federal overreaching into an area wherein local rather than federal laws ought to be applied in order not to upset the delicate federal-state balance per *United States* v. *Enmons*, 410 U.S. 396?

3. Was there sufficient evidence to establish that the alleged extortion affected interstate commerce, where the evidence showed one $150 payment by the tavern owner, and there was no evidence that the tavern's orders of alcoholic beverages was affected thereafter or that its business was in any manner interrupted? Moreover, did not the court direct the jury to find that commerce was affected, thus violating petitioner's right to trial by jury?

4. Did the joint trial of both the substantive Hobbs Act count and the false statement count—where the false statement count alleged that petitioner lied to the grand jury when he denied having committed the act alleged in the substantive count require a severance of counts—since such joint trial informed the jury determining petitioner's guilt as to the substantive count that when petitioner denied said charge before the grand jury, the grand jury believed he was lying to them, and thus prejudiced petitioner in that his credibilty was necessarily impeached *ab initio*?

5. Did not the summoning of the petitioner, a putative defendant, before the grand jury and the return of the false declaration count against him constitute a prejudicial abuse of the grand jury process?

6. Was there sufficient evidence to establish that petitioner committed extortion either by threat of economic harm or under color of official right?

7. Did the trial court commit prejudicial error by submitting an aiding and abetting instruction to the jury when there was no basis in the record therefore, and also by its erroneous instructions concerning what constitutes extortion by threat of economic harm and under color of official right?

Constitutional Provisions, Statutes and Rules Involved

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall ... be deprived of life, liberty, or property, without due process of law...."

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ... and to have the assistance of counsel for his defense."

Title 18, United States Code, sec. 1951, provides in pertinent part as follows:

> "*Interference with Commerce by threats or violence*
>
> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce by robbery or extortion

or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

• • •

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State, and all other commerce over which the United States has jurisdiction."

Rule 14, Federal Rules of Criminal Procedure, provides in pertinent part as follows:

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

Rule 8(a) Federal Rules of Criminal Procedure, provides:

"Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar

character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."

Statement of the Case

Petitioner, Silvio J. Irali, was indicted in No. 72 CR 951, which charged in Count I that he violated the Hobbs Act, in that while a clerk in the Chicago City Collector's Office, he obstructed, delayed and affected commerce, as that term is defined in 18 U.S.C. 1951, by extortion in that he obtained $150 through the wrongful use of fear of economic harm to a tavern owner and under color of official right. (R. 1-2).[1]

In Count 2, petitioner was charged with making a false material declaration to the Grand Jury on August 30, 1972, when he was asked whether he ever asked for or received $150 from Geraldine Svedman, to which question the petitioner answered, denying he received such amount and that such false statement was in violation of 18 U.S.C. 1623.

The testimony was in sharp dispute. Dennis Svedman, the husband of Geraldine Svedman, an unemployed, convicted felon, testified that he assisted her in setting up her tavern. Though he testified that he was present when the $150 was given to the petitioner, when he first reported the alleged extortion to the F.B.I. some 2½ years after the money was supposedly paid to petitioner, he told F.B.I. agent, Karl Marks, that it was the Chicago police who were extorting money in return for the granting of liquor licenses. Karl Marks, a special agent of the F.B.I.,

[1] "R" refers to the page of the Transcript of Record of Proceedings at trial.

was called by the defense and testified that at no time during his extended interview with Dennis Svedman was the petitioner's name mentioned. In fact, special agent Marks testified that Svedman told him Geraldine had said that she gave the $150 to Officer Greenwhich.

Another special agent of the F.B.I., John Dallman, was called by the defense. Both Dennis and Geraldine Svedman testified that her mother, Jean Gordon, was present when the money was allegedly paid to the petitioner. Special Agent Dallman testified that when he first interviewed both of them, neither told him that Jean Gordon had driven downtown with them and withdrew $150 from the bank and then went with them to see the petitioner that day to give him the $150. Though Jean Gordon testified that she withdrew the $150 on the same day that they went to see the petitioner, Agent Dallman testified that just ten days prior to her taking the witness stand, Jean Gordon told him that she withdrew the $150 from the bank a day or so *before* Geraldine and Dennis went to see the petitioner.

The court sentenced petitioner to one year on Count 1 and one year on Count 2, the sentences to run consecutively.

Statement of Facts

The facts are set forth in the panel's opinion, App. A, pp. 1a-13a, and are not repeated herein to avoid unnecessary duplication. Special facts will be referred to in the course of this Petition where necessary for an understanding of the arguments raised herein.

REASONS FOR GRANTING THE WRIT

I.

There was no proof that the "commerce" was of an interstate character as required by the statute.

Title 18, Section 1951, makes it a federal offense to extort where the extortion interferes with interstate commerce, as commerce is defined therein. Extortion which has no affect on commerce, or which affects merely local or intrastate commerce, is not proscribed by Section 1951.

It has been a long established policy that a criminal statute must be strictly construed, and any ambiguity must be resolved in favor of lenity. *United States* v. *Wiltberger*, 5 Wheat. 76, 95; *United States* v. *Halseth*, 342 U.S. 277, 280, 72 Sup. Ct. 275, 276.

> "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with a purpose of Congress in proscribing evil or anti-social conduct." (*Bell* v. *United States*, 349 U.S. 81, 83, 75 Sup. Ct. 620, 622).

This Court has specifically applied this rule to the Hobbs Act. *United States* v. *Enmons*, 410 U.S. 396, 93 Sup. Ct. 1007, 1015 (1973). Accordingly, the Courts have been enjoined from supplying criminal statutes with elements the Congress has chosen to omit. *Arroyo* v. *United States*, 359 U.S. 419, 424, 79 Sup. Ct. 864, 867.

The evidence in this case does not permit any interpretation that interstate commerce was involved. The proof as to the "commerce" aspect of the goverment's case was that all of the liquor and beer which was purchased by

Gerri's Lounge and sold retail at its location at 4932 West Armitage, Chicago, Illinois, came from local Illinois distributors.[2] While it is true that the local distributors had had purchased the liquors and beers from out of state, these goods had been delivered to the local distributors' warehouses and had come to rest in the State of Illinois before they were sold and delivered to Gerri's Lounge. These beverages had been stored in said warehouses for periods of time up to 45 days (R. 258). The evidence also showed that title to the liquor and beer had vested in the local distributors before delivery to Gerri's Lounge (R. 287). None of the local distributors "special ordered" for individual customers but, rather, filled customers' orders from their existing warehouses stock (R. 265).

When goods come to rest, or reach the end of their destination, they lose their interstate "character". Thus, the character of the commerce in the present case was changed to purely intrastate transactions. In *Brosious* v. *Pepsi-Cola Co.*, 155 F. 2d 99 (3d Cir., 1946), the court affirmed a lower court's dismissal of a complaint in a civil antitrust suit because the defendant's activity was not in interstate commerce. The court held at page 103:

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[2] This method of obtaining beer and liquor is required by Illinois law, for no retail liquor operator may purchase beer or liquor except from a local distributor. See Chap. 43, Secs. 115(c) and (d), and Sec. 121(e), Ill. Rev. Stat. 1971. A local retailer of liquor may not obtain an importing distributor's license and may not sell for resale. Moreover, an importing distributor may not sell at retail. Thus, by law, the local retailer may obtain his goods only from Illinois distributors.

Federal law also makes it illegal for a retailer such as Gerri's Lounge to buy liquor for resale except from a licensed wholesale dealer in liquor. See 26 U.S.C. 5117(a)(i).

> "When a substance is transported from one state into another, the interstate movement ends with the delivery of that substance to a distributing company. *Subsequent sales and deliveries to customers of such company constitute intrastate commerce.*" (Emphasis added.)

Similarly, in *E. Ohio Gas Company* v. *Tax Commission*, 283 U.S. 465, 470-72, 75 L. Ed. 1171, 1174-76 (1931), the court affirmed a decree permitting a local tax to be imposed on receipts from distribution of natural gas once the gas from out of state reached local distribution facilities, stating:

> "The furnishing of gas to consumers in Ohio municipalities by means of distribution plants to supply the gas suitably for the service for which it is intended is not interstate commerce but a business of purely local concern exclusively within the jurisdiction of the state."

The court further held:

> "[I]nterstate commerce ends and intrastate business begins when ... [a commodity] from outside the state passes into local distribution systems for delivery to customers."

In *United States* v. *Wyatt*, 437 F. 2d 1168 (7th Cir., 1971), and *Davidson* v. *United States*, 61 F. 2d 250 (8th Cir., 1932), defendants' Dyer Act convictions were reversed upon findings that the cars in question had come to rest and were no longer in commerce when received by the defendants.

In *O'Kelley* v. *United States*, 116 F. 2d 966, 968 (8th Cir., 1941), the court reversed because:

> "The property had been received and accepted at its destination. The property was not then the subject of interstate commerce."

The Court in *United States* v. *Yoppolo*, 435 F. 2d 625-26 (6th Cir., 1970), held that an interstate or foreign shipment loses its characteristic when it arrived at its final destination and is there delivered.

Further evidence that the character of the goods that were sold to Gerri's Lounge had changed from interstate to intrastate is the fact that a state tax is imposed upon all distributors for the privilege of engaging in business as an importing distributor of alcoholic liquor in the State of Illinois. Chapter 43, Section 158, Ill. Rev. Stats., imposes such a tax upon importing distributors located in the State of Illinois that import liquors from outside of the state. It has been held that if a state imposes a tax on goods, the goods no longer can be considered in interstate commerce. In *Brown* v. *Houston*, 114 U.S. 622, 29 L. Ed. 257 (1885), this Court had to decide whether or not a particular shipment of coal was or was not "in interstate commerce" when a local tax was imposed; if the coal were in interstate commerce, it could not lawfully be subject to a local tax. The court found that the coal was no longer in interstate commerce when the tax was imposed because it "had come to its final place of rest, for final disposal or use." Thus, the local taxation was upheld.

Other evidence that the transactions involved in this case were intrastate in character appear from the requirement of Chapter 43, Sections 115(c)(d) and Section 121(c), Ill. Rev. Stats., that retailers are required to purchase not only from an Illinois distributor, but from one authorized to sell within a limited local area. This clearly manifests the intent of the state legislature to make the purchase of

liquor by a retailer from a distributor within the State of Illinois a purely local matter within the control of the State. Any attempt, therefore, to place an interstate label on liquor which can be warehoused for an indeterminant time and which may be sold only to a retailer in a limited intrastate area would be an overbroad extension of the commerce clause, especially as it is limited by the Twenty-first Amendment, which places the regulation of purchases for resale or any purposes directly within the scope of state power.

Thus, there was no interstate commerce involved. The "commerce" allegedly affected was without federal jurisdiction.

II.

Certiorari should be allowed to determine whether the Hobbs Act, 18 U.S.C. 1951, applies to such purely local, low level matters, or whether such application constitutes "an unprecedented incursion into the criminal jurisdiction of the states" within the meaning of United States v. Enmons, 410 U.S. 396.

In *United States* v. *Enmons*, 410 U.S. 396, this Court ruled that violence during a legitimate labor dispute did not constitute a Hobbs Act violation:

> "Even if the language and history of the Act were less clear than we have found them to be, the Act could not be expanded as the Government suggests for two related reasons. First, this being a criminal statute, *it must be strictly construed*, and any ambiguity must be resolved in favor of lenity.... [Citations omitted] Secondly, it would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly

> conduct of strikes. Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change in federal labor law or such *an unprecedented incursion into the criminal jurisdiction of the States.*" Id. at 411. (Emphasis added.)
>
> Mr. Justice Blackman, joining the Court's opinion, stated:
>
> "This type of violence, as the Court points out, is subject to state criminal prosecution. That is where it must remain until the Congress acts otherwise in a manner far more clear than the language of the Hobbs Act." Id. at 412.

Similarly, the conduct here alleged to have violated the Hobbs Act is not of the caliber and magnitude to warrant federal intervention. Section 1951 was not intended to reach such low level local matters. *United States* v. *Caldes*, 457 F. 2d 74 (9th Cir., 1972). The conduct charged to have been committed by the defendant would be more suitably prosecuted in the state courts (official misconduct, accepting a bribe, etc.).

There is nothing about the alleged conduct of the petitioner which suggests any reason why the state police powers need to be supplemented by the federal government. It is unlikely that Congress intended to authorize federal intervention in local law enforcement in a marginal case such as this. It is also doubtful that Congress intended by Section 1951 to elevate this type of conduct to the level of the federal court.

To give such broad ranging application to Section 1951 would "alter federal-state relationships, overextend limited federal police resources and transform relatively minor state offenses into federal felonies." *Rewis* v. *United*

States, 401 U.S. 808, 91 S. Ct. 1056 (1971). See also: *United States* v. *Altobella*, 443 F. 2d 310 (7th Cir., 1971); *United Stctes* v. *McCormick*, 442 F. 2d 316 (7th Cir., 1971).

In *United States* v. *Bass*, 404 U.S. 336, cited and relied upon in *Enmons*, 410 U.S. at 411-12, this Court stated:

> "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. *Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States....* [W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive balance between federal and state criminal jurisdiction." 404 U.S. at 349. (Emphasis added.)

Certiorari should be granted to determine whether application of the Hobbs Act to the case at bar upsets this delicate balance.

III.

There was no proof that commerce was affected at all, and the court in effect directed the jury to find that it was affected, thus violating petitioner's right to trial by jury.

To fall within the proscription of Section 1951, a defendant's conduct must "obstruct, delay or affect" commerce. In *Stirone* v. *United States*, 361 U.S. 212, 218, 4 L. Ed. 2d 252, 259 (1960), this court stated that to sustain a conviction under that section, two essential elements must be alleged and proven:

> "... interference with commerce and extortion. Both elements have to be charged. Neither is surplusage and neither can be treated as surplusage. The charge that interstate commerce is affected is critical since

> the Federal Government's jurisdiction of this crime rests only on that interference."

It is therefore an essential, and clearly jurisdictional requirement, that the Government prove that interstate commerce was obstructed, delayed, affected, or otherwise interfered with.

The statute in question was promulgated by Congress in furtherance of its power to regulate interstate and foreign commerce. This Court stated: "In our view the legislation is directed at the protection of interstate commerce against injury from extortion. . . ." *United States* v. *Green*, 350 U.S. 415, 420. The conduct held violative of the Act in that case was defendants' attempts to obtain by threat money from their employer in the form of wages to be paid for fictitious and unwanted labor services. More recently, this Court stated, in *Stirone* v. *United States*, 361 U.S. 212, 215, that the Hobbs Act:

> "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish *interference* with interstate commerce by extortion, robbery or physical violence." (Emphasis added.)

In the case at bar, taking the government's evidence as true, the proof on this point substantially amounts to this: the petitioner accepted a sum of $150 on November 21, 1969, which he stated he was to give to the police officer who was processing Geraldine Svedman's application for a liquor license. The $150 was not obtained from the resources or assets of either Gerri's Lounge, or its owner, Geraldine Svedman. That money was given to Mrs. Svedman by her mother, Jean Gordon.

None of the "commerce" witnesses testified that their orders or their sales and deliveries were affected, or

would have been affected, by the payment of $150 to the defendant by the owner of Gerri's Lounge on November 21, 1969. They testified that they did not "special order" for customers but filled customers' orders from their existing inventory. The volume or size of their inventory was not dependent on the wishes of any of their customers. Two of the witnesses testified that periodically they would order a set or fixed amount (R. 264, 277). Another of the witnesses testified that his company's order for any given year was fixed at the end of the previous year based upon a review of their inventory and their projected needs (R. 284). It was *not* established that the payment of $150 to the defendant, by Geraldine Svedman, on November 21, 1969, had any affect whatsoever on commerce.

While the statute speaks of obstructing or interfering with interstate commerce "in any way or degree," it is clear from the cases that some amount of harm must be established. *Esperti* v. *United States*, 406 F. 2d 148, 150 (5th Cir. 1969); *United States* v. *Battaglia*, 394 F. 2d 304, 312 (7th Cir. 1968). There was no proof that Geraldine Svedman's ability to transact business, including the purchase of liquor, was affected in the least by the payment of such a nominal amount as $150, and it is unreasonable to infer that either her ability to transact business or commerce was affected.

The evidence also failed to prove commerce was affected under the theory of "depletion of assets" or "diminished resources." It clearly appeared from the testimony that the $150 payment that allegedly was made to the defendant did not come from the treasury of Gerri's Lounge, as in *United States* v. *Provenzano*, 334 F. 2d 678 (3rd Cir. 1967), or from the cash register of that

business, as in *United States* v. *Augello*, 451 F. 2d 1167 (2nd Cir. 1971). Since the payment was not from the resources of the business, or its owner, it could not have depleted or diminished the assets or resources of either. The trial court was in clear agreement with the petitioner's position. In ruling on the defendant's post-trial motions, the trial judge stated:

> "The principal question with respect to the defendant's guilt on Count 1 is whether the money paid to him must be extorted from a person engaged or to be engaged in interstate commerce or may be extorted from a third person who furnished money only to pay the extortion and would not have used it for the procurement of goods in interstate commerce. In the case at bar, the money was furnished by the mother of the license applicant but was obtained from and paid to the defendant by the applicant. The prosecution failed to prove beyond a reasonable doubt that the mother's payment to her daughter was a loan or that it would have ever been put into the business for the procurement of goods in interstate commerce. The indictment did not allege this and the statute does not require it. Thus, the government's cases on depriving a business of operating funds (diminishment of capital) are not in point. . . ."

The court, however, instructed the jury both that the degree to which commerce was affected was irrelevant (R. 747), and that payment of any amount of money by the tavern owner would necessarily affect interstate commerce. (R. 747). Giving such instruction over objection constituted prejudicial error, because the court effectively removed from the jury's consideration the question whether the evidence proved, beyond a reasonable doubt, the essential element of a harmful effect upon interstate commerce.

While the statute speaks of obstructing or interfering with interstate commerce "in any way or degree," it is clear from the cases cited above that *some amount of harm must be established.* By the combined effect of the language referred to above, the jury was directed by the court to find that commerce was in fact affected merely by the payment of a small sum of money.

Here, the jurors were told that it is the depletion of the resources of the business engaged in interstate commerce which permit the inference that the businss was affected. Under the court's instructions, the jury was obligated to find that commerce was affected, even if the payment had been a dollar.

The jury should have been permitted to consider whether commerce was in fact affected by the payment of $150 by the tavern owner. Absent any such evidence (and the evidence is to the contrary) the jury would not be entitled to reach the conclusion that commerce was necessarily affected from the mere fact that the payment had been made. Yet the court conclusively directed them to find that it was so affected.

This amounted to a finding of fact against petitioner by the court, which is constitutionally forbidden, *Sparf and Hansen* v. *United States*, 156 U.S. 51, 105-06; *Mims* v. *United States*, 375 F. 2d 135, 148 (5th Cir. 1967).

Because the element of affecting commerce is essential to conviction, because the government failed to prove beyond a reasonable doubt that commerce was affected, and because this issue was effectively removed from the jury's consideraion, Certiorari should be granted.

IV.

The joinder in one indictment of the substantive Hobbs Act count and the false statement count resulted in a misjoinder under Rule 8 (a) F.R.C.P. which was prejudicial per se and a severance of counts should have been ordered. Even if the joinder of said counts was proper Rule 14 F.R.C.P. required the trial judge to order a severance of counts to avoid prejudice to the petitioner. Since the false statement count alleged that petitioner lied to the grand jury when he denied having committed the act alleged in the substantive count—such joint trial informed the jury determining petitioner's guilt as to the substantive count that when petitioner denied said charge before the grand jury, the grand jury believed he was lying to them, and thus prejudiced petitioner in that his credibility was necessarily impeached ab initio. Certiorari should be granted to consider the propriety of trying the substantive and false statement counts in a single trial.

Count I charged petitioner with a violation of the Hobbs Act, in that he extorted the sum of $150.00 on November 21, 1969 from Geraldine Svedman, which extortion obstructed, delayed and affected commerce, as defined in 18 U.S.C., 1951.

Count II alleged that on August 30, 1972, petitioner committed a different crime—that of making a false material declaration to the Grand Jury in that he lied to the Grand Jury when he denied that he ever received $150.00 from Geraldine Svedman, in violation of 18 U.S.C. 1623.

It was prejudicial and improper to hold the petitioner to trial on Count I and II together, as Rule 8 (a) forbids the joinder of two or more offenses in the same indictment unless they "are of the same or similar

character, or are based on the same act or transaction, or on two or more acts or transactions connected together, or constituting parts of a common scheme or plan."

The Hobbs Act violation charged in Count I is not of the same or similar character as the false declarations violation charged in Count II. It is also obvious that those alleged offenses were not based on the same act or transaction or constitute parts of a common scheme or plan, because of the disparate nature of the offenses and the great time lapse between the dates of their alleged commission.

Petitioner was entitled to have the jury decide his guilt or innocence upon the Hobbs Act charge (Count I) without their contamination by exposure to evidence relating to the false declaration charge against him (Count II). Moreover, he was entitled to be tried on Count I by a jury that was not cognizant that a grand jury had seen fit to indict him for lying on the basis of grand jury testimony denying one of the factual allegations—to wit, having received money from the tavern owner—necessary to prove the Hobbs Act charge.

In other words, by trying Counts I and II together, the jury was undeniably informed that, when in a grand jury proceeding petitioner denied having committed the Hobbs Act violation, the grand jurors believed he was lying, and such belief was so strong that they indicted him for perjury on the basis of his testimony. Such awareness by the trial jury must necessarily have irreparably damaged petitioner concerning Count I, particularly in that the jury would tend to disbelieve him when he took the stand and denied the allegations of Count I. After all, the grand jury had already determined

that when he denied those allegations before him, he was lying.

The evidence upon the false declaration charge was not admissible against petitioner as to the Hobbs Act offense, yet, the jury heard the evidence regarding the false declaration and the Hobbs Act charge as part and parcel of the same trial.

The fact that petitioner did not make a pre-trial motion for severance does not preclude relief by this Court from the erroneous and prejudicial joinder of Counts I and II. It has been expressly stated that both the trial and appellate courts have a continuing duty, regardless of whether defendant makes a motion for severance, to avoid prejudice as a result of joinders, and that if prejudice resulted from jointly proceeding on more than one charge, the Defendant will not be held to any asserted waiver of such point in the lower court. *United States* v. *Gougis*, 374 F. 2d 758, 762 (7th Cir. 1967). The court in *Gougis* also went on to state:

> "Rule 14 F.R.Cr.P. does not specifically require a motion for severance for it states, 'If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.' The wording of the Rule would indicate a continuing duty during the trial on the part of the court to avoid prejudice as a result of a joinder."

However, at the close of both the government's case and all the evidence, the petitioner urged the trial court not to submit Count II to the jury for its determination.

Since the alleged act of extortion and the subsequent acts of testifying before the grand jury are unrelated as to character and as to time, and cannot be considered as part of a common scheme or plan within the meaning of Rule 8(a), the joinder of these counts was impermissible. *King* v. *United States*, 355 F. 2d 700, 703 (1st Cir. 1966).

Further the joinder of these charges for trial was prejudicial to petitioner under the facts of the case at bar; therefore, severance should have been ordered pursuant to Rule 14. In the instant case, compelling petitioner to go to trial on both charges simultaneously was inherently prejudicial.

V.

The summoning of the petitioner before the grand jury and the return of the false statement count represents a prejudicial abuse of the grand jury process. In view of the continuing and increasing use by the government of the tactic of bringing a putative defendant before a grand jury, and, upon his denial of having committed an offense, indicting and trying him both for the offense and for the false statement to the grand jury certiorari should be granted to consider the propriety of such procedure.

The return of Count II of the indictment, which charged false declarations, and its joinder with Count I, clearly represents an abuse of the grand jury process by the government. The circumstances under which the petitioner was brought before that body and the nature of the questions asked of him demonstrate that the return of Count II was not a bonafide attempt to redress a deflection of the grand jury's inquiry. Rather, that count is the product of an improper use of the grand

jury beyond the jurisdictional competence of that body, i.e., merely extracting testimony with a view to a perjury prosecution.

The interrogation of petitioner before the grand jury which gave rise to the perjury charge also constituted an endeavor by the government either to impair possible defenses to the Hobbs Act charge or to secure discovery from the putative defendant; indeed, one is hard put to imagine any interpretation of the situation which would permit characterization of the inquisition as a legitimate quest for information.[4]

This court has recognized that a police officer or other public employee who is subpoenaed to testify before the grand jury faces "a choice between the rock and the whirlpool." If he refuses to give testimony before the grand jury, he will be suspended or discharged from his employment. He therefore faces a choice of forfeiting his job or incriminating himself. *Garrity* v. *New Jersey*, 385 U.S. 493, 87 S. Ct. 616 (1967).

The government, in this case, has added a new dimension to this dilemma. At the time the petitioner was subpoenaed, the government had information that caused them to view him as prospective defendant rather than as a mere witness. This clearly appears from the nature

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[4] Nor was petitioner's choice a simple one. When summoned before the grand jury, petitioner could confess to the accusations of extortion and preclude any possible defense at trial; deny the charges and stand trial under the onus of the grand jury's characterization as "perjury" of the very testimony, the acceptance of which by the trial jury is indispensible to acquittal; or refuse to testify and stand trial only on the Hobbs Act charge, but as a public employee under the onus of possible suspension from the City Collector's Office.

of the questions asked of the petitioner and the return of Count I of this indictment. The petitioner appeared before the grand jury and was asked questions accusing him of criminal conduct. Petitioner denied the accusations. He, in effect, entered his plea of not guilty. The govenment then added a count for false declarations. This action manifested an attempt on the part of the government to punish petitioner for refusing to confess to those accusations of which the government believed him guilty. The prejudice to petitioner is obvious, for the trial court imposed a sentence of one year on Count II to run *consecutively* to the sentence imposed on Count I.

It also appears that the petitioner was subpoenaed to appear before the grand jury on August 30, 1972, so that the government could entrap him into a situation which would provide justification for their obtaining an additional count for false declarations. *Brown* v. *United States*, 245 F. 2d 549 (8th Cir. 1957); *United States* v. *Cross*, 170 F. Supp. 303 (D.C. 1959); *United States* v. *Icardi*, 140 F. Supp. 383 (D.C. 1956). Support for this contention appears from the fact that the indictment against the petitioner was returned on the same day that he appeared before the grand jury. Under these circumstances, the government cannot seriously contend, as in *U.S.* v. *Sweig*, 441 F. 2d 114 (2nd Cir. 1971) that their case against the petitioner had not been sufficiently developed at the time petitioner appeared before the grand jury to insure the return of an indictment against him for a Section 1951 violation. The fact that the indictment was returned within an hour after the defendant testified on Aug. 30, 1972, is persuasive evidence to rebut such an argument.

The return of the false declaration count also reflects an attempt on the part of the prosecutor to poison the minds of the jury against the petitioner. The addition of that count conveyed to the jury that the petitioner was guilty of the offense alleged in Count I because a grand jury charged him with lying about his involvement in that offense. The addition of Count II, because of the nature of the offense charged therein, had the prejudicial effect of undermining the petitioner's credibility in the eyes of the jury. This endeavor to impair the defense to the contemplated charges was clearly a misuse of the grand jury. The government should not be permitted to profit from such improper conduct. *U.S.* v. *Doe*, 445 F. 2d 1270 (1st Cir. 1972); *In re: Russo*, 448 F. 2d 369 (9th Cir. 1971); and *U.S.* v. *Dardi*, 330 F. 2d 316 (2nd Cir. 1964).

In the Northern District of Illinois, joint indictments and trials upon substantive and false statement charges is the rule, rather than the exception. In its investigation and prosecution of so-called "official corruption" cases involving alleged criminal conduct of police officers, politicians and public employees, the United States Attorneys office for this District commonly summons the potential defendant before the grand jury—though sufficient evidence without summoning him exists to indict—and then indicts and tries him upon both the substantive and false statement charges if he testifies before the grand jury denying the facts of the substantive offense.

Abuses of the grand jury process such as that in this case, violate the concept of fundamental fairness inherent in due process, which is required by the Fifth Amendment. *Bursey* v. *U.S.*, 466 F. 2d 1059 (9th Cir. 1972. Certiorari should be granted so this Court may

consider the propriety of such tactics and determine whether they are inherently prejudicial for the above stated reasons.

VI.

There was no proof that the petitioner committed extortion by (a) threat of economic harm or (b) under color of official right.

There was a total failure to prove that the conduct of the defendant constituted extortion. Extortion is defined by Section 1951 (b) (2) as:

> "The obtaining of property from another with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

Though the government indicated that it was "proceeding with an official rights theory of extortion" (R 644-645) the indictment alternatively charged that the defendant committed extortion by obtaining property from the victim "with her consent, induced by the wrongful use of fear of economic harm and under color of official right. . . ."

It has been recognized that as used in the statutory definition of the term extortion, the word "fear" essentially involves the defendant's generation of fear in his victim, which is reasonable, and which is used by the defendant to obtain money or property. *U.S.* v. *Tolub*, 309 F. 2d 286 (2nd Cir. 1962); *Carbo* v. *U.S.*, 314 F. 2d 71 (9th Cir. 1963). While the word "fear" has been expanded to include fear of economic loss, as the indictment charges, that fear must also be reasonable. *Bianchi* v. *U.S.*, 279 F. 2d 182, 189 (8th Cir. 1955); *Callanan* v.

U.S., 233 F. 2d 171, 175 (8th Cir. 1959). There was a failure to prove that the petitioner instilled a fear of economic loss in Geraldine Svedman.

The evidence established that Geraldine Svedman took the initiative in seeking out the petitioner to help her secure a liquor license. That fact is important in determining whether the action of the petitioner constituted extortion. The court in *U.S.* v. *Hyde*, 448 F. 2d 815 (5th Cir. 1971), stated that a distinguishing feature of extortion is the initiative and purpose on the part of the official and the fear and lack of voluntariness on the part of the victim. In this case, the initiative clearly was on the part of the victim. The purpose of the petitioner was to help Mrs. Svedman obtain her liquor license.

The fear of economic harm, as any fear under this section, must be reasonable. When the petitioner allegedly communicated the officer's extortionate demand to the victim, she was not in full compliance with items she was required to furnish Frank Greenwich the license officer who was to approve her application. Both she and her husband testified that even after she saw the petitioner on Nov. 8, 1969, she made a number of visits to see Officer Greenwich to furnish the required items. However, at no time, did either she or her husband speak to Officer Greenwich about his demands for money. It is unreasonable to assume that this woman, who had balked at making the payment, would not ask her extortioner anything about his demand. She testified that the demand for money was first communicated to her by the petitioner the second time she called him, on November 12, 1969. She had filed her application on Oct. 29, 1970. A delay of some two weeks had occurred prior to the communication of the demand for money.

It was obvious that this delay was caused by her failure or inability to comply with the requirements of the police department and not by any action on the part of the petitioner.. There was no proof that she reasonably believed that unless she made the payment to the petitioner she would not be issued a liquor license. The evidence, however, did show that she would not be issued a license until she was in full compliance with the police department's requirements.

There was not one iota of evidence that the petitioner was doing anything other than trying to help Geraldine Svedman obtain her license. The government's evidence if taken as true, revealed only that after being asked by the "victim" to look into the matter of her application for a liquor license, and after being called by her repeatedly, the petitioner relayed the license officer's demand for money to her. The petitioner undertook to help Mrs. Svedman by seeking a reduction in the amount of money allegedly demanded. After accomplishing the reduction, the petitioner then acted as a messenger boy in delivering the money to the license officer. Such scant participation cannot serve as a basis for an extortion conviction. As the court in *U.S.* v. *Nedley*, 255 F. 2d 350 (3rd Cir. 1958), stated in connection with the term robbery as applied to Section 1951, that to categorize the alleged conduct of the petitioner as extortion "is to make a mockery of that term."

The indictment also charged that the petitioner committed extortion under color of official right, in that he "threatened to use his position, powers and duties as an employee of the City of Chicago assigned to the Collector's Office, to impede, obstruct and prevent the carrying on the business of buying and selling alcholic bever-

ages and other articles, by Gerri's Lounge, that is to say that the issuance of the City of Chicago retail liquor license for Gerri's Lounge would be delayed unless, and until Geraldine Svedman, then known as Geraldine Zaczynski, made a payment of money to the defendant of $150.00."

The key to common law extortion under color of right as it has been included in the Hobbs Act is the taking of money for doing something the officer was already under a duty to do. The essence of the crime of extortion by a public officer, then, is a taking under color of office. The money or thing received must have been claimed or accepted in right of office, and furthermore, the person paying must have yielded to official authority. *Therefore, the crime of extortion is not committed where an officer receives a compensation or fees for service it was not his official duty to perform.*

That distinction was recognized in *U.S.* v. *Addonizio*, 451 F. 2d 49 (3rd Cir. 1971), cert. den., 92 Sup. Ct. 949, wherein the court observed:

> "Extortion involves payment in return for something *to which the payor is already legally entitled.*" (451 F. 2d 72) (Emphasis in original.)

Inasmuch as the Hobbs Act definitions of robbery and extortion are taken from New York law, *U.S.* v. *Addonizio*, 451 F. 2d 49 72 (3rd Cir. 1971), cert. den., 92 S. Ct. 494; *U.S.* v. *Nedley*, 255 F. 2d 350 (3rd Cir. 1958); *U.S.* v. *Kubacki*, 237 F. Supp. 638, 641 (E.D. Pa. 1965), the reasoning of New York courts concerning what does or does not constitute extortion under color of official right is vitally significant in determining the proper construction of that term in the federal statute.

It has been consistently held that proof of extortion requires that the payment be made to the public officer as compensation for his official service, where he is not entitled to the amount of compensation he demands. *People* v. *Waldo*, 146 N.Y.S. 581; *Temple* v. *Brooks*, 151 N.Y.S. 490.

On the other hand, where a public official demanded payment or other compensation to do something other than he was required by law to do, the courts have held that the crime of extortion under color of official right could not be sustained. *People* v. *Samuels*, 71 N.Y.S. 2d 562; *People* v. *Rudolph*, 98 N.Y.S. 2d 446, *rev. in part*, 100 N.E. 2d 142.

The Seventh Circuit has similarly interpreted the definition of extortion. In *United States* v. *Sutter*, 160 F. 2d 754 (7th Cir. 1974), it was held that an officer who solicited funds for a charitable cause and kept the money himself could not be guilty of extortion, because that money also was not received under color of his office.

There was a total failure to prove the "under color of official right" allegation. No evidence was presented that the petitioner threatened to use his position as an employee assigned to the City Collector's Office to delay the issuance of a license to Gerri's Lounge. There was also no testimony to the effect that the petitioner held himself out to be in a position to withhold or delay the issuance of the license. In fact the testimony clearly established that the City Collecter's Office did not have the responsibility for approving liquor licenses. That office only processed license applications by directing them to the building department, the police department, the license commissioner and to the City Clerk for each department's consideration and action.

On the basis of the government's evidence it is clear that the alleged demand for money was Officer Greenwich's and not the petitioner's. The petitioner merely relayed that demand to the "victim". There was not a scintilla of evidence that the petitioner used his position as a clerk in the City Collector's Office to solicit or receive any money, or that while he was dealing with the alleged victim, he took advantage of his position as an employee with the City of Chicago. His employment with the City "was only a condition that was present but was not used." *U.S.* v. *Sutter*, 160 F. 2d 754, 755 (7th Cir. 1947). The language "under color of official right" must be construed to punish those officials who use their employment to extort. It is the "oppressive use of official position that is the essence of the offense." *U.S.* v. *Sutter, supra*, at 756.

In *U.S.* v. *Nardello*, 393 U.S. 286, 289 (1969), this court had occasioned to consider the meaning of the term "extortion" in construing another statute. It said:

> "At common law a public official who under color of office obtained the property of another not due either to the office or the official was guilty of extortion."

In *U.S.* v. *Hyde*, 448 S. 2d 815, 833, the court when considering the "under color of official right" language, stated:

> "The language of the statute is consistent with an interpretation that the wrongful use of an official right may be a basis for extortion . . . It is the wrongful use of an otherwise valid power that converts dutiful action into extortion."

There was a complete failure to prove that the petitioner committed extortion under color of official right. The fact that he was a public employee meant nothing in connection with his alleged receipt of money. He could have just as well been a private individual. The money that he received was not received by him under color of office. He did not wrongfully use an official right or an otherwise valid power. The acts attributed to him were not committed in the performance of his official duties.

Since the proof alluded only to an improper use of office by Officer Greenwich, the petitioner argued that no one can comit extortion under color of official right by using the office of another. The court of appeals in affirming the petitioner's conviction stated it was "unnecessary to reach that question since the jury could have found the petitioner guilty of having aided and abetted Officer Greenwich in extorting the money under color of official right." The petitioner submits that this is erroneous and not possible under the facts of this case. The basic principle of law recognized is that "an aider and abettor may not be guilty in aiding and abetting a principle unless a principal did as a matter of fact ecmmit a crime." *Edwards* v. *U.S.*, 286 F. 2d 681 (5th Cir. 1960); *U.S.* v. *Howitt*, 55 F. Supp. 372, 374 (D.C.S.D. Fla. 1944). In *U.S.* v. *Barfield*, 447 F. 2d 85 (5th Cir. 1971) the court stated at p. 89:

> "While the conviction of the principals is not a prerequisite to the conviction of an aider and abettor, *the Government must nevertheless establish beyond a reasonable doubt that the alleged offense was committed by someone* and that the person charged as an aider and abettor assisted in the commission of the crime."

The Government's proof did not establish beyond a reasonable doubt that Greenwich was guilty of extorting the money under color of official right. There was no evidence to prove that Greenwich actually made the demand for money that the petitioner allegedly relayed to Mrs. Svedman. There was also no testimony that Greenwich told either the petitioner or Mrs. Svedman, that he would delay or not issue the license unless the money was paid. Finally, there was no proof that Greenwich received the money. Based upon that kind of a record, it was not proven beyond a reasonable doubt that Greenwich was a guilty principal. It cannot, therefore, be said that the jury could have found the petitioner guilty of aiding and abetting Officer Greenwich.

Certiorari should be granted to determine whether or not petitioner committed extortion under either theory and also wether he could be found guilty of extortion under color of official right by using the office of another.

VII.

The trial court erred in its instructions to the jury.

A. Aiding and abetting.

The trial court erred in instructing the jury that the petitioner could be found guilty if the jury found that he aided and abetted the commission of the crime charged in the indictment. There was no basis or support in the record for such an instruction. Neither was there a request by the government that the jury be so instructed (R. 660).

The applicable standard on aiding and abetting is the oft-quoted statement of Judge Learned Hand that it is necessary that the defendant "in some sort associate

himself with a venture, that he participated in it as something that he wished to bring about, and that he seek by his action to make it succeed." *U.S.* v. *Peoni,* 100 F. 2d 401, 402 (2nd Cir. 1938). The defendant must act or fail to act with the specific intent to facilitate the commission of a crime by another. *U.S.* v. *Dallas,* 418 F. 2d 221, 222 (6th Cir. 1969).

In *Johnson* v. *U.S.,* 195 F. 2d 673, 675 (8th Cir. 1952), the court stated:

> "Generally speaking, to find one guilty as a principal on the ground that he was an aider and abettor, it must be proven that he shared in the criminal intent of the principal and there must be a community of unlawful purpose at the time the act is committed."

The court in *Snyder* v. *U.S.,* 448 F. 2d 716 (8th Cir. 1971), stated at page 718:

> "By far the most important element is the sharing of the criminal intent of the principal, and this is concededly difficult to prove; nevertheless the government must prove this sharing of criminal intent."

In *U.S.* v. *Varelli,* 407 F 2d 735 (7th Cir. 1969), the court stated at page 749:

> "[T]o constitute one an aider and abettor, he must not only be on the ground, and by his presence aid and encourage, or incite the principal to commit the crime, but he must share the criminal intent or purpose of the principal."

The indictment did not charge that the petitioner aided and abetted Frank Greenwich or anyone else in the commission of the offense. There was no direct testimony

of any collaboration between Greenwich and the petitioner. Unlike the situation in *U.S.* v. *Provenzano,* 334 F. 2d 678 (3rd Cir. 1964), the evidence did not establish the petitioners essential participation with Greenwich in a scheme to mulct Geraldine Svedman.

The only inference that could be drawn from the government's evidence was that the petitioner intereeded on behalf of Mrs. Svedman in helping her get her license and in getting Greenwich's demand for money reduced. It was clear from the evidence that there was no community of unlawful purpose between the petitioner and Greenwich and that the petitioner did not share in Greenwich's criminal intent. The submission of an aiding and abetting instruction was error.

B. Extortion under color of official right.

The trial court erred in instructing the jury on extortion under color of official right when there was no evidence to support such an instruction. In addition, thereto, the instruction given was not a correct statement of the law. The Court instructed the jury that:

> "If a public employee obtains money from another by fear induced by wrongful fear of official right, then that is sufficient to satisfy the requirements of the law that money be obtained by means of extortion." (R. 747).

The petitioner objected to this instruction because there was no evidence in the record that his alleged receipt of money was in connection with his employment or that his employment was directly involved in the receipt of that money (R. 668).

The instruction given did not inform the jury that the payment of money must be paid or received under color of office for services which the public employee was obligated to perform. The Court's instruction permits the jury to find that *any* receipt of money by a public employee, regardless of whether it was received in connection with his office or official duties, constitutes extortion.

Such an instruction is clearly erroneous, *U.S.* v. *Nardello*, 393 U.S. 286, 289 (1960); *U.S.* v. *Hyde*, 448 F. 2d 815, 853 (5th Cir. 1971); *U.S.* v. *Sutter*, 160 F. 2d 754, 755 (7th Cir. 1947), and resulted in extreme prejudice to the petitioner.

C. Extortion by fear of economic harm.

The trial court also erred in instructing the jury on extortion by "fear of economic harm," after learning that the government viewed the case as one involving extortion under color of official right. When the government indicated that it was "proceeding with an official rights theory of extortion" (R. 644), the defense did not want the jury to be able to convict on the basis of "fear of economic harm" and asked the Court to strike that language from the indictment (R. 645). The Court refused, stating:

> "I think they are alternatives. They are in the statute, and I think they are probably supposed to be in the indictment, although they are not so stated."

The Court then compounded its error by instructing the jury on extortion "by fear of economic harm" (R. 745, 746, 747). Since the government expressly indicated that it was not proceeding on that theory, it was error for the Court to so instruct the jury.

CONCLUSION

Petitioner prays that Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit and that for any or all of the foregoing reasons his convictions be reversed, or reversed and remanded.

Respectfully submitted,

GEORGE J. COTSIRILOS
Attorney for Petitioner
Silvio J. Irali

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 73-1640

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SILVIO J. IRALI,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 72 CR 951
THOMAS R. MCMILLEN, *Judge*

ARGUED DECEMBER 5, 1973 — DECIDED SEPTEMBER 12, 1974

Before SWYGERT, *Chief Judge*, SPRECHER, *Circuit Judge*, and POOS, *Senior District Judge*.[1]

SWYGERT, *Chief Judge*. Defendant-appellant Silvio J. Irali was indicted on two counts, extortion in violation of 18 U.S.C. §1951 (Hobbs Act) and making a false declaration before the grand jury in violation of 18 U.S.C. § 1623. He was convicted on both counts after a jury trial and received consecutive one-year sentences.

[1] The Honorable Omer Poos, Senior Judge of the United States District Court for the Southern District of Illinois, is sitting by designation.

In October 1969 Mrs. Geraldine Svedman (whose name was Geraldine Zaczynski at the time) purchased a tavern at 4932 West Armitage in Chicago which she named Gerri's Lounge. After borrowing $2500 from her mother, she made an initial downpayment of $1500 and agreed to pay the balance of the $2500 price in monthly payments of $135.

Concurrently with her purchase, Mrs. Svedman went to the Shakespeare Avenue Police Station and filled out a liquor license application. Police Officer Greenwich assisted her. She then went to the city hall, filed the application, and paid her fee. Officer Greenwich was assigned to investigate Mrs. Svedman's application, and she had to return to him with additional information between ten and fifteen times before the license was finally approved.

On November 8, 1969 Mrs. Svedman was in another tavern with her future husband when they struck up a conversation with defendant Irali. They told him of the delay in obtaining a liquor license. He said that he was a clerk in City Hall and that he might be able to help her. (At the time, Irali was a principal clerk in the liquor license department of the City Collector's office.)

Irali asked for the name of the license officer. Mrs. Svedman said that it was Greenwich. He said he knew Greenwich and could find out what was causing the delay. He gave her his office telephone number and asked that she call him in a few days. When she called two days later, Irali said that he had not contacted Greenwich and asked her to call back. Two days later she called again with Dennis Svedman, her husband, listening on an extension and asked if Irali had spoken to Officer Greenwich. Irali said that, "Greenwich wanted $500 for his troubles." Mrs. Svedman said that it was "ridiculous" and that she did not "have that kind of money." Mrs. Svedman testified that Irali said "that because he was a friend of [hers], he would talk to Officer Greenwich again, but that all the license officers down there, that's the way they do things." She further testified that he stated "that

Greenwich was a hardnose and he wouldn't waive any money" and that he would try talking to Greenwich again.

On November 17, 1969 Mrs. Svedman called the defendant and asked if her license had been approved. He said that Greenwich wanted $250. She said that she did not have that kind of money. Irali replied that he would see if there was anything he could do. After the telephone conversation, she told her husband, who had again been listening to the conversation on the telephone, that she thought she would have to pay the money or she would never be able to open her tavern. On November 19, 1969 she called the defendant and asked if he had spoken with Greenwich. Irali asked her if she could come up with $100 or $150. She told him that she would talk to her mother. After her mother agreed to lend her $150, she called Irali. He said that he would check with Greenwich and call her back. Later that day Irali called her and said that Greenwich would take the $150. The next day she went to the bank with her mother who withdrew $150 and gave the money to Mrs. Svedman. They then went to the city hall accompanied by Dennis Svedman where Mrs. Svedman gave Irali the $150. Irali told them, "For sure, you will get your license now." She received her license five days later and immediately opened her tavern for business.

The evidence established that Mrs. Svedman purchased liquor for her tavern from three Illinois distributors who had purchased their supplies from out of state.

To prove the false declaration count, the Government introduced the grand jury transcript of Irali's testimony in which he denied having ever received $150 from Geraldine Zaczynski Svedman in connection with the issuance of her liquor license.

I

The defendant contends there was no proof that the commerce was of an interstate character, that commerce was affected by the extortion demand, and that the Hobbs

Act was not meant to reach "low level local matters" such as a $150 payoff.

The first contention is based on an argument that the liquor sold to Gerri's Lounge had come to rest in Illinois before its sale and distribution and thus was no longer part of interstate commerce. We have rejected that argument in three recent decisions. *United States* v. *Pacente*, No. 72-1988, *en banc* (7th Cir., August 6, 1974) sl. op. at 10; *United States* v. *DeMet*, 486 F.2d 816, 821-22 (7th Cir. 1973); *United States* v. *Gill*, 490 F.2d 233, 236-37 (7th Cir. 1973).

The second contention is that there was no direct proof that the victim of the extortion, Geraldine Svedman, suffered any loss in her ability to transact business by the payment of such a nominal amount and that it would be unreasonable to infer such fact from the evidence. The costs of doing business affect all profit-oriented business. Here, since (1) the victim had to borrow money to open the business, (2) the original extortion demand was twenty percent of the purchase price of the tavern, and (3) the amount actually paid was more than her monthly payment for the business, it was not unreasonable to infer that such an illegal cost affected her ability to do business. In any event, the Hobbs Act prohibits affecting commerce "in any way or degree" whether it forces the victim to close or only impedes his ability to conduct business.

The jury could also have inferred from the evidence that the victim would not have been able to open her doors for business if she had not paid the money since Irali and especially Officer Greenwich were in positions to delay and possibly bring about the rejection of her liquor license. Any purposeful delay would have affected interstate commerce through unconsummated purchases and sales since Gerri's Lounge could not do business without the license.

The defendant also contends that the Hobbs Act was not meant to encompass the amount involved, $150. In *Gill* it was $300 and in *DeMet* the sum was about $150 in cash

and $300 worth of liquor. The court rejected the same de minimis argument in the latter two cases.[2] (The author of this opinion pointed out in his concurrence in *DeMet*, 486 F.2d at 822-23, that there appears to be no minimum limit to the reach of section 1951 and that he had registered his objection in *United States* v. *Amabile*, 395 F.2d 47, 54 (7th Cir. 1968), *cert. denied*, 401 U.S. 924 (1971).)

II

The defendant contends that the verdict was not supported by the evidence in that the jury in returning a "verdict impliedly [gave] credence to the testimony of witnesses who [were] admitted liars, whose testimony [was] bloated with inaccuracies and internal inconsistencies and whose past histories cast great doubt on their honesty" whereas the "defendant was a completely candid and truthful witness." Thus this court is invited to review the jury's resolution of the credibility of the defendant and the prosecution witnesses. We must decline the invitation since the inconsistencies in the testimony were minor in nature and were brought to the attention of the jury. The jury was also aware of the false statement about the victim's employment on her application for a license. None of these matters require that we discredit the prosecution testimony as a matter of law.

The defendant relies on *United States* v. *Litberg*, 175 F.2d 20 (7th Cir. 1949), in contending that the inferences necessary for conviction which might be drawn from the evidence were unreasonable, although he concedes that credibility determination is within the province of the jury. We have reviewed the evidence and conclude that it would not be unreasonable for the jury to find the defendant guilty as charged beyond a reasonable doubt.

III

The defendant maintains that the Government failed to prove that his conduct constituted extortion as a tech-

[2] The issue was not raised in Pacente where the sum was $200.

nicality. The indictment charged Irali with alternative theories of extortion: the obtaining of money either (1) induced by wrongful use of fear of economic harm or (2) under color of official right. The instructions included both theories. The defendant relies on the Government trial counsel's statement at the instruction conference that "[w]e are proceeding with an official rights theory of extortion" and he argues that the fear of economic harm theory was waived. The defendant interprets the statement out of context. It is clear from the record that Government counsel made the statement while arguing about an instruction dealing with the *reasonableness* of the fear of economic harm. He did not waive the theory that the extortion was by fear of economic harm; he emphasized only that he was also proceeding under color of official right and that fear was not an element of the crime under that theory.[3]

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[3] The court and counsel were discussing the following instruction which was tendered by the defendant:
"For the acts alleged in the indictment to constitute extortion, you must find that the fear alleged in the mind of the alleged victim to be a reasonable one and there must be some basis for such fear in the evidence. Unjustified or unreasonable fear in the mind of an alleged victim cannot be the basis for you to conclude that he or she was the victim of an extortion."
The pertinent discussion follows:
The Court: I think it is all right if it is somehow limited to one element of extortion, which is the obtaining money by threat and inducing of fear. That is why I would change the last line to read—I wouldn't have it read, ". . . she was the victim of extortion . . ." because this is only one element.
Mr. King [Assistant United States Attorney]: What are we talking about, 15?
The Court: I would have it read ". . . she was induced by fear to pay money . . ."

There was sufficient evidence under either theory for the jury to convict the defendant. First, contrary to Irali's contention, it was not unreasonable for Mrs. Svedman to

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[3] (Continued)

Mr. Michletto [Defense Counsel]: What would your Honor suggest would be— ". . . victim of fear to pay money . . ."?

The Court: "She was induced by fear to pay money."

Mr. King: What are we substituting?

Mr. Michletto: The last sentence would read, then, your Honor ". . . unjustified or unreasonable fear in the mind of an alleged victim cannot be the basis for you to conclude that he or she . . ."

The Court: Well, "she was induced by fear to pay money."

Mr. King: Wait a minute, your Honor. The Government objects to that instruction. Not only is it not artfully drawn, but it is—again it is not an accurate statement of the law. We are taking one element of the law, one potential element of Hobbs Act extortion, and magnifying it so that it minimizes the other possible alternatives; and that is why I suggest that this instruction should be considered together with the instructions with respect to official right. The Government objects to this instruction.

The Court: I think it is something the jury should be instructed on. I grant you that it is not very well drafted. I think perhaps the way to have it read would be, ". . . any fear in the mind of the alleged victim must be a reasonable one, and there must be some basis for such fear in the evidence. Unjustified or unreasonable fear in the mind of an alleged victim cannot be the basis for you to conclude that she was induced by fear to pay money."

Mr. King: Would you read the first sentence again, please.

The Court: ". . . any fear . . ." those two words will replace the first two lines. The rest of the sentence—

Mr. King: Wait a minute. "Any fear . . ."

believe that she would not get her liquor license until she paid the money. Although the victim may have first approached Irali about help in the processing of her application due to the delay, the evidence established that he was the one who raised the necessity of a payment to Officer Greenwich of "$500 for his troubles." It is also clear that Irali relayed or concocted further demands when Mrs. Svedman balked and that he finally suggested and accepted $150. The day that Mrs. Svedman received her license, she opened her tavern. A denial or even a delay in obtaining her license meant lost business. According to the evidence, the average liquor license is obtained within ten days to three weeks of the application. Here the payment was made on the twenty-third day after the application was filed and the license was then received five days later. It would be permissible for the jury to infer that the victim had a reasonable fear of economic harm if she did not pay Irali.

Second, the defendant contends that there was no evidence that he obtained this money through his official position in the liquor license department of the City Collector's office. This department did not have the responsibility for approving liquor licenses, but did have the responsibility for processing them by sending them to the building department to consider whether the zoning was proper, to the police department for its recommendation on the application itself, to the license commissioner for decision, and then to the City Clerk for issuance. The

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[3] (Continued)

The Court: Strike out the rest of the first two lines.

Mr. King: ". . . any fear in the mind of the alleged victim . . ."

The Court: ". . . must be a reasonable one, and there must be some basis for such fear in the evidence."

Mr. King: In that case we must object to the second sentence. Because it becomes redundant, it re-emphasizes the question of reasonable or unreasonable, justifiable and unjustifiable fear. We are proceeding with an official rights theory of extortion.

The Court: All right, I will give it as modified.

City Collector had the responsibility of forwarding the application between the departments. A delay in this ministerial duty could cost the license applicant in lost revenue due to inability to open a tavern.

Mrs. Svedman knew Irali worked in the city hall on liquor licenses. He admitted to having helped her with her application though he denied accepting the $150. Although Irali, as a principal clerk in the liquor license department of the City Collector's office could only have delayed or at worst lost the application, the person on whose behalf he said he spoke, Officer Greenwich, had an official position in which he could recommend that the license not be issued. Accordingly, there was sufficient evidence for the jury to have found that Irali, acting either under his own position or purportedly through Greenwich's position, affected interstate commerce by extortion.[4]

IV

The defendant contends that the Government failed to prove any affect on commerce during the negotiation stage in November 1969 and that the trial court erred in permitting testimony about liquor sales to Mrs. Svedman after November. The indictment charged that the extortion was committed on or about November 1969. The evidence showed that the victim did not receive her license until she paid the $150 to Irali and that when she received her license, she immediately opened her tavern, making sales and purchases during the month of November. The testimony about latter sales was relevant since it helped establish the affect on interstate commerce through the delay in opening the tavern.

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[4] Irali argues that "no one can commit extortion under color of official right by using the office of another." It is unnecessary to reach the question since the jury could have found him guilty of having aided and abetted Officer Greenwich in extorting the money under color of official right.

V

The defendant argues that there was a misjoinder of the counts in violation of Rule 8(a), F.R.Crim.P. The panel in *United States* v. *Pacente*, 490 F.2d 661 (7th Cir. 1973), held, under facts essentially the same as those here, that joinder of a false declaration count with an extortion count was proper. The court *en banc* agreed. Sl. op. at 3.

Another issue which Irali obliquely raises is that there should have been a severance of the counts because the joinder was prejudicial. This issue was resolved against the defendant by the court sitting *en banc* after the hearing in *United States* v. *Pacente*, sl. op. at 3-9. The court held there that the denial of a motion to sever the counts under Rule 14, F.R.Crim.P. was not an abuse of discretion.[5]

VI

Irali contends that the summoning of him before the grand jury was an abuse of the grand jury process.[6] A twofold argument is advanced: (1) the prosecutor was trying to undermine defendant's credibility in the eyes of the petit jury and (2) the grand jury was "merely extracting testimony with a view to a perjury prosecution." The first argument is basically that prejudice resulted in joining the counts. This argument, based on Rule 14, F.R.Crim.P. was rejected by the *en banc* court in *Pacente*. The second argument was dealt with recently in *United States* v. *Devitt*, No. 73-1691 (7th Cir., July 2, 1974). In that case the defendant was convicted

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[5] In the instant case, unlike *Pacente*, no motion to sever was made.

[6] He contends that he was indicted for making a material false declaration to the grand jury within an hour after his testimony. Although we have found no basis for this statement in the record and the appellant has failed to point out any such reference, such a short time span would not be a basis for holding that the grand jury process had been abused.

of giving false answers to questions concerning extortionate conduct on his part for which the statute of limitations had run. Senior District Judge Campbell, sitting by designation and speaking for the court, said that it was a legitimate purpose of the grand jury to ask a defendant questions in order to obtain the names of unknown extortion victims which would further its investigation of "possible extortionate conduct by certain Chicago Police Department personnel in violation of the Hobbs Act." Sl. op. at 5. In the instant case the grand jury was also investigating possible violations of the Hobbs Act by the Chicago police. It is obvious from the evidence in this case that there was a question whether Officer Greenwich was engaged in the extortion. An investigation of such alleged conduct was within the proper bounds for the grand jury, and the calling of a putative defendant before the grand jury for questioning in regard thereto did not violate his constitutional rights. *United States* v. *Cefalu*, 338 F.2d 582 (7th Cir. 1964).[7]

Irali finally contends that by calling him before the grand jury, the Government placed him in a prejudicial dilemma. If he admitted taking the payoff, he would incriminate himself; if he invoked the Fifth Amendment, he would be dismissed from his job;[8] and if he denied

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[7] Defendant contends that *Cefalu* is distinguishable because he was not a public official and also because he pleaded the Fifth Amendment. These distinctions are not material. A grand jury is permitted to summon all citizens, regardless of official position. Nor can invocation of the Fifth Amendment be considered justification for different treatment since this only occurs after a witness has appeared before the grand jury.

[8] In *Confederation of Police* v. *Conlisk*, 489 F.2d 891, 895 (7th Cir. 1973), *cert. denied, sub nom Rochford* v. *Confederation of Police*, 42 U.S.L.W. 3594 (April 22, 1974), this court held that Rule 51 of the Chicago Police Department Rules, insofar as it prohibits policemen from exercising their Fifth Amendment rights is unconstitutional. There is no evidence that there was such a rule

taking the payoff, he would be indicted for making a material false declaration. In *United States* v. *Devitt, supra,* sl. op. at 9-10, Senior Judge Campbell, after discussing *Garity* v. *New Jersey,* 385 U.S. 493 (1967); *Gardner* v. *Broderick,* 392 U.S. 273 (1968); and *Uniform Sanitation Men* v. *Commissioner of Sanitation,* 392 U.S. 280 (1968), as well as our recent decision in *Confederation of Police* v. *Conlisk,* 489 F.2d 891 (7th Cir. 1973), wrote:

> "[W]e find nothing in these decisions or in this court's holding in *Confederation of Police* which grants a witness before the grand jury the third alternative which, in substance, is proposed by the defendant in the instant case: the right under such circumstances to knowingly make a false material declaration while testifying under oath before a grand jury."

The *Devitt* case controls here.

VII

Finally, the defendant challenges the instructions given on aiding and abetting, affect on commerce, extortion under color of official right, and extortion by fear of economic harm. He argues that it was improper for the court sua sponte to give an instruction on aiding and abetting since there was no support for it in the record. The instruction read:

> "Whoever aids, abets, counsels, commands, induces or procures the commission of a crime is punishable as a principal. In order to aid or abet the commission of a crime a person must associate himself with the criminal venture, participate in it and try to make it succeed."

The evidence lends itself to giving of this instruction because the testimony established that Irali represented

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[8] (Continued)
in the City Collector's office or that Irali would have been dismissed if he had invoked the Fifth Amendment protection against self-incrimination.

that it was Officer Greenwich who wanted the money and because it was he, Irali, who served as the go-between both in reducing the demanded sum as well as in collecting the payoff.

He further challenges the instruction, contending that it failed to set forth specific criminal intent as an element of the crime of aiding and abetting. Unlike *United States* v. *Nix*, No. 73-1449 (7th Cir., August 8, 1974), sl. op. at 2-3, this objection was not raised at the instruction conference. The instruction is taken from the Supreme Court's definition of aiding and abetting in *Nye and Nissen* v. *United States*, 336 U.S. 613, 619 (1949), and unlike the instruction in *United States* v. *Bryant*, 461 F.2d 912 (6th Cir. 1972), the second sentence told the jury that to find Irali guilty, it must find that he participated in and tried to make the commission of the crime succeed.

The defendant also objected to the instruction on the requisite affect on commerce necessary to constitute a violation of the Hobbs Act in that it failed to set forth a necessary minimum level. The instruction was that if commerce was affected "in any way or degree" by extortion, a crime was committed. This instruction is in accord with our decision in *United States* v. *DeMet*, *supra*, where the de minimis argument was rejected.

The defendant also contends that the trial judge erred in giving an instruction on the theory that Irali had extorted money through fear of economic harm after the Government maintained that it was proceeding under a color of official right theory. We reject this contention for the reasons set forth in section III of this opinion.

Finally the defendant argues that the instruction interpreting the color of official right was erroneous. The instruction read:

> "If a public employee obtains money from another by fear induced by wrongful *fear* of official right, then that is sufficient to satisfy the requirements of

the law that money be obtained by means of extortion" (Emphasis added.)

Since the instruction, as presented and accepted at the instruction conference had the word "use" rather than "fear," we assume the substitution was an inadvertent mistake. In any event, we do not consider this a basis for reversal since the mistake was not to the defendant's detriment and defendant never interposed an objection.

The conviction on both counts of the indictment is affirmed.